Supreme Court, U.S.
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NO. _____

THE SUPREME COURT OF THE

UNITED STATES

OCTOBER 1994 TERM

MOSE MATHIS AND SIDNEY MATHIS, PETITIONERS	PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
V.	
VELSICOL CHEMICAL CORPORATION, RESPONDENT	

PETITION FOR WRIT OF CERTIORARI

MOSE MATHIS, PRO SE
792 SOUTHERN ROAD
CHICKAMAUGA, GA 30707
(706)539-2406

SIDNEY MATHIS, PRO SE
3782 KENSINGTON ROAD
CHICKAMAUGA, GA 30707
(706)539-2253

3pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER OR NOT THE GEORGIA SUPREME COURT RULING, THAT THE DISCOVERY RULE IS INAPPLICABLE TO PROPERTY DAMAGE CASES, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

II.

WHETHER OR NOT THE GEORGIA SUPREME COURT RULING, THAT THE DISCOVERY RULE IS INAPPLICABLE TO PROPERTY DAMAGE CASES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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STATE CASE

Mercer Univ. v. National Gypsum Co., 258 Ga. 365 (366), 368 S. E. 2d 732 (733) 12, 14

STATEMENT OF NO REPORTS

There have been no reports of any opinion delivered in this case by any Court or Administrative agency.

GROUNDS OF JURISDICTION

1. The date of the entry of the judgment sought to be reviewed is November 9, 1994.

2. There have been no rehearings or extensions of time in this case.

3. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1254(1), which reads as follows:

> "Cases in the Courts of Appeals may reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows in pertinent part:

> "No person shall .....
> nor be deprived of life, liberty,
> or property, without due process of
> law;....."

The Fourteenth Amendment to the United States Constitution reads as follows in pertinent part:

> ".....nor shall any State
> deprive any person of life, liberty,
> or property, without due process of
> law;....."

STATEMENT OF THE CASE

On the eighth day of February, 1991, plaintiffs, Mose Mathis and Sidney Mathis, brought a diversity suit against defendant, Velsicol Chemical Corporation. The Mathises alleged that Velsicol, pursuant to a contractual agreement, delivered many drums to plaintiffs for disposal on the plaintiffs' land in Walker County, Georgia. Unknown to plaintiffs, many of the drums contained toxic substances, according to the complaint. Plaintiffs alleged they had discovered the existence of the toxic material within four years of bringing their suit. Velsicol denied any wrongdoing, and defended on the ground of the statute of limitations, among other defenses. Velsicol also counterclaimed for CERCLA contribution, based upon response costs they had incurred.

After discovery was completed, Velsicol moved for Summary Judgment based upon the defense of the four-year statute of limitations under Georgia law for damage to property. (O.C.G.A. 9-3-30). Mose and Sidney Mathis defended on the ground that the Georgia case law disallowing the "discovery rule" was unconstitutional under the Fourteenth Amendment of the United States Constitution. The District Court of the Northern District of Georgia, Rome Division, held for Velsicol and dismissed the plaintiffs' complaint. After Velsicol voluntarily dismissed its counterclaim, this appeal was taken to the United States Court of Appeals for the Eleventh Circuit.

The United States Court of Appeals for the Eleventh Circuit, after argument, dismissed the appeal of the Mathises without opinion.

BASIS OF JURISDICTION IN TRIAL COURT

The basis for jurisdiction in the District Court for the Northern District of Georgia, Rome Division, was diversity of citizenship under 28 U.S.C. §1332 (a)(1).

ARGUMENT

ISSUE NO. I

DID THE GEORGIA SUPREME COURT RULING, THAT THE DISCOVERY RULE IS INAPPLICABLE TO PROPERTY DAMAGE CASES, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

Corp. of Mercer University v. National Gypsum Co., 877 F.2 35, (11th Circuit 1989) involved a case in which Mercer University was suing for damages to its buildings brought long after the four-year statute of limitations of O.C.G.A. 9-3-30 had run. Mercer reasoned that since the damage was discovered within four years of suit, they were protected from the running of the statute of limitations by the "discovery

rule." The United States Court of Appeals for the Eleventh Circuit certified the matter to the Georgia Supreme Court. In Corporation of Mercer University v. National Gypsum Co., 258 Ga. 366, 368 S.E. 2d 733, the Georgia Supreme Court held that the discovery rule only applies in cases of personal injury. The United States Court of Appeals for the Eleventh Circuit accepted the Georgia Supreme Court ruling as binding. Constitutional issues were not raised in either of the cited cases.

The 14th Amendment to the United States Constitution provides in pertinent part that state action is proscribed which causes a deprivation of "life, liberty or property without the due process of law." Duke Power Co. v. Caroline Environmental Study Group, Inc., 438 U.S. 59 (1978) held a law is in violation of the due process clause if it is "demonstrably arbitrary or irrational." The

Mercer cases in effect hold that if a tortfeasor is successfully surreptitious about his wrongdoing, he can hide behind the statute of limitations, despite the fact that the injured party knows of no wrong having been committed. The law, as an institution, is respected because it punishes the guilty and protects the innocent. The Mercer decision does exactly the opposite and violates due process of law.

The due process clause of the Fifth and Fourteenth Amendments to the United States Constitution assure that no person will be denied the right to present to the courts allegations concerning fundamental constitutional rights. Mitchum v. Purvis, C.A. Ala., 650 F2d 647; Dreher v. Sielaff, C.A. Ill. 636 f2d 1141; Gillespie v. Civiletti, C.A. Wash., 629 F2d 637; and

Silver v. Cormier, C.A. Colo., 529 F2d 161. This applies to state courts as well as Federal Courts. Boling v. National Zinc Co., D.C. Okl. 435 F. Supp. 18.

A person cannot be deprived of the right to access to the courts unless the balance of the state and private interests favors the government. Logan v. Zimmerman Brush Co., Ill. 102 S. Ct. 1148, 455 U.S. 422, 71 L. Ed. 265.

There has been no governmental goal or interest of the State of Georgia articulated by the Georgia Supreme Court in its decision which abolished any discovery rule for all plaintiffs other than personal injury plaintiffs who have injuries which developed over a period of time. Mercer Univ. v. National Gypsum Co., 258 Ga. 365, S.E. 2d 732.

As it is customary to articulate

reasons for legal rules promulgated by court decision, this omission alone would lead one to suspect that there is none.

Rights of property protected by the due process clause cannot be interfered with by state action which is arbitrary or without reasonable relationship to some purpose within the competency of the state to effect. Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas, 45 S. Ct. 441, 267 U.S. 552, 69 L. Ed. 785.

The burdens placed upon one group of litigants should be no greater nor less than those placed upon others. Doe v. Schneider, D.C. Kan., 443 F. Supp. 780.

ISSUE NO. II

DID THE GEORGIA SUPREME COURT RULING, THAT THE DISCOVERY RULE IS INAPPLICABLE TO PROPERTY DAMAGE CASES, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The Fourteenth Amendment to the United States Constitution provides that "no state shall.....deny to any person within its jurisdiction the equal protection of the laws." It is wrong to reward a knowing concealer of a cause of action as against the victim of the wrong who has no knowledge of the wrong. But in addition these code sections, as construed by the Mercer cases, prefer one type of plaintiff over others,

for no articulable reason. The Georgia Supreme Court has stated that the discovery rule applies only to personal injuries which develop over a period of time. To apply such an egregious rule as that espoused in the Mercer case to selected plaintiffs is a violation of equal protection. No reasonable state of facts can be conceived to justify such a classification, which is "insidious", "wholly arbitrary", and "capricious." See Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911); McGowan v. Maryland, 366 U.S. 420 (1961); and U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

The Mercer rule arbitrarily distinguishes between personal injury cases and property damage cases. Are not property rights fundamental rights specifically

mentioned by the Fifth and Fourteenth Amendments to the United States Constitution? What rational reason can be given for such a distinction? Also, the Mercer decision draws a distinction between those who know of their damage and those who do not know of their damage, through no fault of their own. What is the rational justification for that?

The obliteration of the discovery rule impacts upon plaintiffs who are wronged by all types of defendants; i.e. - willful, negligent, grossly negligent and defendants subject to strict liability. The culpability of the defendant is not the issue. The only criteria for a defendant receiving the windfall of no discovery rule is that the plaintiff is not personally injured over a period of time. The

important point is that the plaintiff effectively has no ability to seek redress in Court because of ignorance, whether caused by defendant or not.

The instant case is conceptually indistinguishable from a personal injury victim which has damages which develop over a period of time. For example, a person exposed to asbestos would have microscopic injuries to his lungs upon exposure but would probably not develop clinical symptoms until years later. The minute Mose Mathis and Sidney Mathis buried containers of waste (unknown to them to be hazardous) on their land, a nominal amount of injury to the land would take place. With the progression of time, more and more seepage into the ground water would take place with resulting injury to the land. Eventually the contamination

would become apparent. Unfortunately for the Mathis brothers, their ignorance does not toll the statute of limitations. Fortunately for the asbestos victim, his ignorance does toll the statute of limitations. There is no rational basis for distinguishing betwen these cases, but Georgia does. In the process, the Equal Protection Clause of the 14th Amendment is violated.

Georgia is out of step with the rest of the Country in obliterating the discovery rule. It is even out of step with 42 U.S.C. § 9658 which creates a discovery rule in the CERCLA context. Georgia has excepted a certain class of personal injury plaintifs, for no articulable reason. Georgia has wronged almost everyone in the state.

CONCLUSION

The Summary Judgment dismissal of plaintiff's Complaint should be reversed and a trial granted.

Respectfully submitted,

Sidney Mathis
3782 Kensington Road
Chickamauga, GA 30707

Mose Mathis
792 Southern Road
Chickamauga, GA 30707

DO NOT PUBLISH

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-9513

D.C. DOCKET NO. 4:91-00024-CV-HLM

MOSE MATHIS; SIDNEY MATHIS
Plaintiffs, Counter-
Defendants-Appellants,

versus

VELSICOL CHEMICAL CORPORATION
Defendant, Counter-
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
November 9, 1994

Before BIRCH and DUBINA, Circuit Judges, and
Johnson, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.
Costs taxed against plaintiffs, counter-defendants-appellants.

Judgement Entered: November 9, 1994.
For the Court: Miguel J. Cortez
Clerk
By: Karleen McNabb, Deputy
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

MOSE MATHIS AND SIDNEY MATHIS, Plaintiffs	)	CIVIL ACTION 4:91-cv-24-HLM
v.	)	
VELSICOL CHEMICAL CORPORATION, Defendant,	)	
VELSICOL CHEMICAL CORPORATION, Counter-claimant	)	
v.	)	
MOSE MATHIS AND SYDNEY MATHIS, Counter-defendant	)	

ORDER

This case is before the Court on Defendant Velsicol's Motion for Summary Judgment. Defendant claims that all three claims discernable from Plaintiffs' complaint are barred by the applicable

statute of limitation. Plaintiffs argue that abolition of the "discovery rule" in injury to property cases is unconstitutional and unfair. For the reasons stated below, the court concludes that all of Plaintiffs' claims are barred by the applicable statute of limitations and that the only claims which remain in this case are Defendant's counterclaims for indemnification and contribution.

PROCEDURAL HISTORY

The Court has issued several substantive orders prior to the filing of the instant motion for summary judgment which simplified this case immensely. First, the Court denied Defendant's motion to dismiss stating that sufficient facts were pled to allow a jury to conclude that Defendant harmed Plaintiffs' land. Next, Defendant filed a motion for judgment on the

pleadings and a motion to strike which the Court partially granted. This second order paired away the irrelevant defenses to Defendant's counterclaim and conclusively determined that Plaintiff was a "liable party" under CERCLA for any clean-up costs Defendant may incur in the future for cleaning up the Marble Top landfill. See Mathis v. Velsicol, 786 F. Supp. 971 (N.D. Ga. 1991). This order also allowed Plaintiffs to amend their complaint to more particularly plead their allegations of fraud.

Plaintiffs amended their complaint and attempted to define more specifically their allegations of fraud; however, the amended complaint did not meet the requirements of Fed. R. Civ. P. 9(b) and the Court ultimately granted Defendant's motion to strike the fraud allegations. The Court

also considered and ruled on several discovery motions which helped the parties organize this case. With all the pre-trial motions decided, the court notes that the issues remaining, prior to the ruling on the motion sub judice, are Plaintiffs' claims for breach of contract, nuisance and interference with enjoyment of property.[1] As noted above, Defendant still has two claims remaining one for indemnification and one for contribution. Both of these claims relate to any costs Defendant may incur in the possible future clean-up of the Marble Top landfill.

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[1]The Court notes that Plaintiffs do not dispute, in their response brief, that these are the only three theories under which they seek relief.

SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The moving party bears the heavy burden of demonstrating that no dispute as to any material fact exists. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). The District Court's duty is to view the evidence and all factual inferences in the light most favorable to the party opposing the motion. See Bradbury v. Wainwright, 718 F.2d 1538, 1543 (11th Cir. 1983). In deciding a motion for summary judgment, it is not the Court's function to decide issues of genuine material fact.

Rather, the Court's function is to determine whether such an issue exists to be tried. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Warrior Tombigbee Transportation Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983). Facts which in good faith are disputed, but which do not resolve or affect the outcome of the suit will not properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248.

Genuine disputes regarding facts are those where the evidence is such that a reasonable jury could return a verdict for the nonmovant. Anderson, 477 U.S. at 248. Moreover, for factual issues to be "genuine", they must have a real basis in the record. Matsushita, 475 U.S. at 587. The nonmovant "must do more than simply show that there is some metaphysical doubt as to

the material facts. . . . Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Id. at 586 (citations omitted.)

FACTS

The facts delineated below are not disputed. Plaintiffs are joint owners of land in Walker County, Georgia, known as the Marble Top Landfill and Velsicol is a chemical manufacturer with a plant located in Chattanooga, Tennessee. Between 1973 and 1980 Plaintiffs contracted with Velsicol to dispose of thousands of drums of industrial waste. The last transportation of chemical waste by Plaintiffs from Defendants' plant to the Marble Top landfill occurred prior to February 1980. Plaintiffs claim that the contract between the parties stated that the

waste disposed of was to be non-hazardous waste only, while Velsicol claims that Plaintiffs knew that some of the waste contained hazardous materials. Regardless of the parties' initial understanding, Plaintiffs have subsequently learned that the drums which are buried on Marble Top Landfill actually contain hazardous material, not non-hazardous material. Consequently, after Plaintiffs discovered the contents of the drums, they filed this lawsuit in February 1991 against Velsicol. The lawsuit commenced more than eleven years after the last delivery of waste to Marble Top, but only a few years after Plaintiffs claim they discovered some of the waste buried was actually hazardous waste.

STATUTE OF LIMITATIONS

Defendant moves for summary judgment on all three of Plaintiffs' remaining claims

contending that all three claims are barred by the applicable statute of limitations. First, Defendant states that the statute of limitation for breach of contract is six years and that Plaintiffs' contract claim is barred because the last possible delivery of hazardous waste in violation of the contract occurred no later than January 1980 which is longer than six years ago. Second, Defendant asserts that both the nuisance and interference with property claims are governed by a four year statute of limitations which bars both of these claims because the last disposal of waste on the land occurred more than four years ago. Defendant finally states that the so-called "discovery rule" which tolls a statute of limitations until the discovery of the injury does not apply to claims involving injuries to property; it only applies to

injuries to the body. Consequently, as Plaintiffs have conceded that they do not seek any damages for bodily injuries to either Plaintiff, Plaintiffs cannot find comfort in this rule for tolling the statute of limitations.

Plaintiffs' response to Defendant's motion is somewhat confusing. Plaintiffs are apparently arguing that the "discovery rule" should still be the law of the land in this case because the Georgia Supreme Court's abrogation of the rule in injury to property cases was "arbitrary" and capricious and, therefore, the Supreme Court's decision violated the Fourteenth Amendment. With this argument, Plaintiffs are basically asking that this Court to either overrule or ignore binding precedent rendered by a higher court because Plaintiffs do not agree with the decision

rendered by the higher court. Although the Court may sympathize with the harsh result inflicted on Plaintiffs in this case, this Court has neither the authority nor inclination to accept Plaintiffs' invitation to question the legitimacy of the higher court's ruling.

In Corporation of Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989), the Eleventh Circuit adopted the Georgia Supreme Court's answer to a certified question and held that "the discovery rule applies to only cases involving bodily injury", and does not apply to cases involving injury to property. Id. (citing Mercer Univ. v. National Gypsum Co., 258 Ga. 365 (1988). Consequently, despite Plaintiffs' protestations to the contrary the discovery rule does not apply in this

case. Therefore, as nuisance and interference with land claims are governed by a four year statute of limitations, see O.C.G.A. § 9-3-30, and all breach of contract claims arising from a written contract are governed by a six year statute of limitations, see O.C.G.A. §9-3-24, Plaintiffs' claims are barred because the last possible act giving rise to any of these claims must have occurred by February 1980 which is eleven years ago and clearly outside the applicable statute of limitations. See Rowe v. Steve Allen & Assoc., Inc., 197 Ga. App. 452, 453 (1990); Gamble v. Lovett School, 180 Ga. App. 708 (1986); McDonald v. Patton, 172 Ga. App. 491 (1984).

Accordingly, this Court GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED, this the (22nd) day of June, 1993.

(HAROLD MURPHY)
UNITED STATES
DISTRICT JUDGE